(9)

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

No. 97-581

In the Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,
PETITIONER

v.

KEITH M. SCOTT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
VICKI MARANI
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

35 pp

QUESTIONS PRESENTED

1. Whether the exclusionary rule applies to parole revocation proceedings.

2. Whether a search of a parolee's residence must be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
I. The exclusionary rule should not apply to parole revocation proceedings	10
A. Extension of the exclusionary rule depends upon balancing the rule's likely deterrent value against its social costs	10
B. The exclusionary rule should not be extended to parole revocation proceedings	14
1. The incremental deterrence of Fourth Amendment violations is limited	14
2. The costs of extending the exclusionary rule to parole revocation proceedings are high	17
II. Where a parolee has consented to searches as a condition of parole, the Fourth Amendment does not require individualized suspicion of wrongdoing to justify a search of his residence	21
A. Constitutional protections may generally be waived in exchange for favorable treatment from the government	22
B. A consent-to-search condition enhances the State's ability to monitor its parolees' compliance with the terms of their release, and is therefore reasonably related to the benefit provided to the parolee	26

Argument—Continued: Page

C. The fact that a potential parolee is forced to choose between unattractive alternatives does not render his consent to search involuntary 27

Conclusion 29

TABLE OF AUTHORITIES

Cases:

Alderman v. *United States*, 394 U.S. 165 (1969) ... 12
Arizona v. *Evans*, 514 U.S. 1 (1995) 11
Bordenkircher v. *Hayes*, 434 U.S. 357 (1978) 23
Brady v. *United States*, 397 U.S. 742 (1970) 23
Bronson v. *Commonwealth Bd. of Probation & Parole*, 421 A.2d 1021 (Pa. 1980), cert. denied, 450 U.S. 1050 (1981) 5
Commonwealth v. *Walter*, 655 A.2d 554 (Super. Ct.), appeal denied, 670 A.2d 141 (Pa. 1995) 3, 28
Commonwealth v. *Williams*, 692 A.2d 1031 (Pa. 1997) 5, 6, 21, 24, 25
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 26
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 16, 18
Griffin v. *Wisconsin*, 483 U.S. 868 (1987) 2, 16, 19, 20, 21, 23
Harris v. *New York*, 401 U.S. 222 (1971) 12
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) 12, 14, 19, 21
Illinois v. *Krull*, 480 U.S. 340 (1987) 11, 12, 14, 17
Illinois v. *Rodriguez*, 497 U.S. 177 (1990) 22
Linkletter v. *Walker*, 381 U.S. 618 (1965) 10
Mapp v. *Ohio*, 367 U.S. 643 (1961) 10
Michigan v. *Long*, 463 U.S. 1032 (1983) 25
Miranda v. *Arizona*, 384 U.S. 436 (1966) 12

Cases—Continued: Page

Morrissey v. *Brewer*, 408 U.S. 471 (1972) 16, 17, 18, 20, 21
Oregon v. *Hass*, 420 U.S. 714 (1975) 12
People v. *Bravo*, 43 Cal.3d 600 (1987), cert. denied, 485 U.S. 904 (1988) 24, 25
Peretz v. *United States*, 501 U.S. 923 (1991) 22
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) .. 22
Stone v. *Powell*, 428 U.S. 465 (1976) 10, 11, 12, 13, 15
United States v. *Calandra*, 414 U.S. 338 (1974) ... 10, 11, 12, 13, 14, 19
United States v. *Havens*, 446 U.S. 620 (1980) 13
United States v. *Janis*, 428 U.S. 433 (1976) 11, 12, 13, 15
United States v. *Jenkins*, 4 F.3d 1338 (6th Cir. 1993), cert. denied, 511 U.S. 1034 (1994) 20
United States v. *Jewel*, 947 F.2d 224 (7th Cir. 1991) 20
United States v. *Kim*, 25 F.3d 1426 (9th Cir.), cert. denied, 513 U.S. 1030 (1994) 20
United States v. *Leon*, 468 U.S. 897 (1984) 10, 11, 12, 13, 16, 17
United States v. *Lynch*, 934 F.2d 1226 (11th Cir. 1991), cert. denied, 502 U.S. 1037 (1992) 20
United States v. *McCrory*, 930 F.2d 63 (D.C. Cir. 1991), cert. denied, 502 U.S. 1037 (1992) 20
United States v. *Mezzanatto*, 513 U.S. 196 (1995) 22, 23, 26
United States v. *Montoya-Ortiz*, 7 F.3d 1171 (5th Cir. 1993) 20
United States v. *Ooley*, 116 F.3d 370 (9th Cir. 1997), petition for cert. pending, No. 97- 2
United States v. *Tejada*, 956 F.2d 1256 (2d Cir.), cert. denied, 506 U.S. 841, 920 (1992) 20

Cases—Continued:	Page
United States v. *Torres*, 926 F.2d 321 (3d Cir. 1991)	20
Walder v. *United States*, 347 U.S. 62 (1954)	12
Weeks v. *United States*, 232 U.S. 383 (1914)	10
Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)	25
Zap v. *United States*, 328 U.S. 624 (1946)	22
Constitutions and statutes:	
U.S. Const.:	
Amend. I	27
Amend. IV	*passim*
Pa. Const. Art. I, § 8	25
Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 316, 104 Stat. 5115	1
Parole Commission Phaseout Act of 1996, Pub. L. No. 104-232, § 2, 110 Stat. 3055	1
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987	1
§ 218(a)(5), 98 Stat. 2027	1
§ 235(a)(1), 98 Stat. 2031	1
§ 235(b)(1)(A), 98 Stat. 2032	1
18 U.S.C. 3563	1
18 U.S.C. 3565	2
18 U.S.C. 3583	2
18 U.S.C. 4201-4218 (1982)	1
37 Pa. Code § 63.4	3
2 Pa. Cons. Stat. Ann. §§ 701 *et seq.* (1995)	4-5
61 Pa. Cons. Stat. Ann. (Supp. 1997):	
§ 331.27a	3
§ 331.27b	3
Miscellaneous:	
4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (2d ed. 1987)	27

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-581

PENNSYLVANIA BOARD OF PROBATION AND PAROLE, PETITIONER

v.

KEITH M. SCOTT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Although parole has largely been abolished within the federal system,[1] the United States has a substantial interest in both of the questions presented by this case. The sound administration of the federal penal system will be impaired if probative evidence that a federal supervisee has violated the terms of his probation or supervised release is excluded from revocation proceedings. See 18 U.S.C. 3563

[1] The Sentencing Reform Act of 1984 (SRA), which became effective November 1, 1987, abolished parole for federal offenses committed after the effective date of the Act. See Pub. L. No. 98-473, Tit. II, Ch. II, §§ 218(a)(5), 235(a)(1), 98 Stat. 2027, 2031. Parole had been governed by the Parole Commission and Reorganization Act, see 18 U.S.C. 4201-4218 (1982). Those provisions have been continued in effect for prisoners who committed crimes before the effective date of the SRA. See SRA § 235(b)(1)(A), 98 Stat. 2032; Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 316, 104 Stat. 5115; parole Commission Phaseout Act of 1996, Pub. L. No. 104-232, § 2, 110 Stat. 3055.

(prescribing conditions of probation), 3565 (authorizing revocation for violation of conditions), 3583 (prescribing conditions of supervised release and authorizing revocation for violation of conditions). And while the federal government has not conditioned probation or supervised release on consent to home searches, the Court's resolution of the consent issue in this case could affect the United States' ability to use evidence seized in state searches of state supervisees. See, *e.g.*, *United States* v. *Ooley*, 116 F.3d 370 (9th Cir. 1997), petition for cert. pending, No. 97- (Jan. 8, 1998). The United States previously participated as amicus curiae in *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), which presented a question concerning the reasonableness of the warrantless search of a probationer's home.

STATEMENT

1. On April 2, 1982, respondent Keith M. Scott was sentenced to ten to twenty years' imprisonment for third degree murder pursuant to his plea of nolo contendere. Pet. App. 1a, 19a. On September 1, 1993, he was released on parole subject to enumerated conditions. *Ibid.* One of the conditions of his parole was that he refrain from "owning or possessing any firearms or other weapons." *Id.* at 1a-2a. At the time of his release, respondent signed Pennsylvania Board of Probation and Parole Form PBPP-11, entitled "Conditions of Parole/Reparole," which stated, *inter alia*:

> In consideration of being granted the privilege of parole/reparole by the Pennsylvania Board of Probation and Parole, I hereby agree that:
>
> * * * * *
>
> I expressly consent to the search of my person, property and residence, without a warrant by agents of the

> Pennsylvania Board of Probation and Parole. Any items, in [sic] the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

J.A. 6a-7a; see Pet. App. 30a n.3.[2]

Approximately five months later, respondent was arrested by three parole officers for parole violations that included his possession of two guns during the first month of his release. Pet. App. 2a, 19a-20a. After taking respondent's house keys from him, parole officers transported him to jail. *Id.* at 2a. Parole officers subsequently searched the house that respondent shared with his mother and stepfather. *Id.* at 2a-3a, 23a-24a. Respondent's mother was present in the house during the search. *Id.* at 3a, 24a. The officers found five unloaded firearms under a sofa in a sitting room adjacent to respondent's bedroom. *Ibid.* Respondent's mother told the officers that the guns belonged to her husband and that respondent was unaware of their presence. *Id.* at 3a, 25a. From a closet in the same room, the officers retrieved a compound bow and three arrows. *Id.* at 3a, 24a.

2. The Board conducted a parole revocation hearing at which respondent moved to suppress the weapons as the

---

[2] The consent term is contained in a parole form that "is a standard form used statewide and parole is conditioned upon signing the form." *Commonwealth* v. *Walter*, 655 A.2d 554, 556 n.1 (Super. Ct.), appeal denied, 670 A.2d 141 (Pa. 1995). Pennsylvania statutes provide a regulatory scheme governing parole searches based on reasonable suspicion, but those provisions do not address consent searches. See 61 Pa. Cons. Stat. Ann. §§ 331.27a, 331.27b (Supp. 1997). Nor are consent searches addressed in the Pennsylvania statute governing the general conditions of parole. 37 Pa. Code § 63.4.

fruit of an unconstitutional search. Pet. App. 3a-4a, 25a. One of the officers who had conducted the search testified that he was authorized to search a parolee's approved residence with or without the homeowner's permission, and that he had searched respondent's residence because a fellow parole officer had told him that there might be guns there. *Id.* at 4a-5a, 25a. The hearing examiner admitted the evidence concerning the weapons found at respondent's residence, stating that the search was "within requirements so established for consent by residences of parolees by parole agents and the Commonwealth." *Id.* at 25a.

Respondent testified at the parole revocation hearing that he did not know the guns were in the house because, before his release, he had instructed his mother and stepfather to get rid of them and his mother told him that they had been removed. Pet. App. 5a, 21a. Respondent's stepfather testified that the guns belonged to him, that he knew guns were not permitted in respondent's approved residence, and that he (the stepfather) had therefore removed them from the gun closet and placed them under the sofa in anticipation of giving them to his brother. *Id.* at 5a, 22a. The Board found that respondent had committed all of the violations alleged against him and ordered him to serve the remainder of his sentence and 36 months' backtime. *Ibid.* Three months later, the Board modified its findings to add that respondent was considered a threat. *Ibid.* Respondent unsuccessfully sought administrative relief from the Board. *Ibid.*

3. Respondent then appealed to the Commonwealth Court of Pennsylvania, which reversed and remanded for a new revocation hearing. Pet. App. 19a-39a.[3] The court

[3] The Commonwealth Court's jurisdiction to consider respondent's appeal rested on the judicial review provisions of Pennsylvania's Administrative Agency Law, 2 Pa. Cons. Stat. Ann. §§ 701 *et seq.*

concluded that the search had been conducted without the consent of respondent's mother, *id.* at 29a-30a, and that the consent-to-search provision of respondent's parole release form "does not comport with the dictates of" applicable precedent, *id.* at 30a n.3. The court also held that "no enacted statute or regulation" gave the parole officers authority to search under the circumstances presented here. *Id.* at 31a. The court further held that the evidence acquired during the search should have been suppressed at the parole revocation hearing. *Id.* at 31a-37a. It explained that, under the circumstances of this case, the exclusionary rule's deterrent effect on unlawful official conduct "substantially outweighs the injury which would result from excluding the evidence obtained from [the parole officer's] illegal search." *Id.* at 36a.

4. The Parole Board obtained leave to appeal to the Supreme Court of Pennsylvania, which affirmed the judgment of the Commonwealth Court. Pet. App. 1a-18a. The court first held that the consent-to-search provision of respondent's parole release form did not provide a valid basis for the search. Relying on its prior decision in *Commonwealth* v. *Williams*, 692 A.2d 1031 (Pa. 1997), the court stated that

> the parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgment that the parole officer has a right to conduct reasonable

(1995). See *Bronson* v. *Commonwealth Bd. of Probation & Parole*, 421 A.2d 1021, 1025 (Pa. 1980), cert. denied, 450 U.S. 1050 (1981).

searches of his residence listed on the parole agreement without a warrant.

Pet. App. 9a-10a (quoting *Williams*, 692 A.2d at 1036). Under *Williams*, the court explained, a "search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty." *Id.* at 10a (quoting *Williams*, 692 A.2d at 1036).[4]

Based on its decision in *Williams*, the Pennsylvania Supreme Court held that respondent "has a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of the consent to search provision." Pet. App. 10a. The court further held that respondent's rights under the Fourth Amendment were "clearly violated since the search was conducted without reasonable suspicion." *Ibid.* The court explained that "the agents' suspicion was based on mere speculation

[4] The court in *Williams* observed that "[o]ther state courts faced with the issue of whether a parolee's Fourth Amendment rights have been violated by a warrantless search by his parole officer where the parolee has signed a consent form upon release have attempted to balance the governmental and individual interests by adopting a 'middle ground' approach," under which parole officers need not obtain a warrant but are required to have reasonable suspicion that the parolee has violated the conditions of his release. 692 A.2d at 1036. The court concluded that "this 'middle ground' approach to warrantless searches pursuant to a signed parole agreement comports with the Fourth Amendment protection afforded to parolees by the United States Supreme Court in [*Griffin* v. *Wisconsin*, 483 U.S. 868 (1987)] and in our sister states." *Id.* at 1037. In the *Williams* court's view, that approach accommodates the State's interest in the effective operation of its parole system, while "protect[ing] the parolee by providing a check against state encroachment upon the parolee's limited Fourth Amendment right to be free from unreasonable searches." *Ibid.*

and was insufficient to support a warrantless search of the room adjacent to [respondent's] bedroom." *Ibid.*

The court next considered whether the evidence acquired during the search should have been suppressed at respondent's parole revocation hearing. The court acknowledged "the general rule that the exclusionary rule is inapplicable in parole revocation hearings." Pet. App. 13a. When the officer conducting the search is unaware of the parolee's status, the court stated, "[t]here is no reason to apply the rule in a parole revocation hearing because it is unlikely to act as an additional deterrent to illegal police behavior." *Id.* at 15a. The court determined, however, that "[a] different balance exists * * * when the officer knows or has reason to know that the suspect is a parolee or probationer." *Ibid.* "In this limited instance," the court concluded, "the deterrent effect to be gained through application of the exclusionary rule in parole revocation hearings substantially outweighs the potential injury to the functioning of the revocation proceedings." *Id.* at 16a. Because the parole officers who conducted the search were aware of respondent's status as a parolee, the court held that "the evidence obtained from the illegal search of his residence should be suppressed." *Id.* at 17a.

5. This Court granted the Parole Board's petition for a writ of certiorari limited to the question whether the exclusionary rule applies to parole revocation proceedings, and invited the parties to brief and argue the following question: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?" 118 S. Ct. 554.

SUMMARY OF ARGUMENT

I. The exclusionary rule should not apply to parole revocation proceedings. The exclusionary rule, as fashioned by this Court, is designed to safeguard the Fourth Amendment rights of the general community by deterring constitutional violations. Because the exclusionary rule impedes the truth-finding process by preventing consideration of probative evidence, this Court has consistently rejected proposed extensions of the rule outside the context of the criminal trial itself.

Extension of the exclusionary rule to parole revocation hearings is unlikely to have a significant impact on the incidence of Fourth Amendment violations. Police officers, whose principal responsibility is the investigation of crimes and the apprehension of criminals, are unlikely to alter their behavior based on the potential admissibility of seized evidence at a parole revocation proceeding, even if they are aware that the object of their search is a parolee. A parole officer is concededly more likely to focus on the potential impact of any misconduct on a parolee's suitability for continued release. Parole officers, however, are unlikely to be subject to the institutional pressures that are thought to require an extraordinary deterrent to unconstitutional behavior.

Extension of the exclusionary rule to parole revocation proceedings would also entail substantial costs, over and above the interference with the truth-finding process that is an inherent consequence of the suppression of probative evidence. The requirement that parole authorities adjudicate suppression motions would significantly complicate revocation proceedings, thereby subverting the State's substantial interest in expeditious and relatively informal resolution of revocation issues. Because a prisoner released on parole before the expiration of his term may have

a greater propensity to engage in conduct that endangers the public than a person who has never been convicted of a crime, the State has an especially strong interest in ensuring that decisions regarding the parolee's suitability for continued release are based on complete and accurate information. Respondent should not be permitted to retain the benefits of parolee status, based on the asserted illegality of the search at issue here, when his failure to comply with the conditions of release indicates that he may pose a threat to the public welfare.

II. Where a parolee has consented to searches as a condition of parole, the Fourth Amendment does not require individualized suspicion of wrongdoing as a predicate for a search of his residence. This Court has repeatedly recognized that consent is a valid basis for search, even in the absence of probable cause and a warrant. The Court has recognized, more generally, that constitutional rights are typically subject to waiver, and that the government has broad latitude to enter into arrangements whereby an individual agrees to surrender such rights in return for some form of favorable treatment.

Just as a criminal defendant may enter into a plea agreement providing for a period of incarceration, nothing in the Constitution prevents a potential parolee from agreeing that, in return for the less onerous punishment of release (under supervision) into the community, the State may carry out a search at any time. Such an arrangement protects the State's interest in reducing the threat to the public safety and welfare that early release may entail. Permitting the enforcement of such agreements is also likely to further the interests of potential parolees: at least in a borderline case, enhancing the State's ability to monitor its parolees may increase a parole board's willingness to release a prisoner into the community. As in the plea bargaining context, moreover,

the prisoner's consent to the search condition is not rendered involuntary by the fact that the alternative—continued incarceration—is an unattractive one.

ARGUMENT

I. THE EXCLUSIONARY RULE SHOULD NOT APPLY TO PAROLE REVOCATION PROCEEDINGS

A. Extension Of The Exclusionary Rule Depends Upon Balancing The Rule's Likely Deterrent Value Against Its Social Costs

The Fourth Amendment prohibits government officials from engaging in "unreasonable searches and seizures" but "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *United States* v. *Leon*, 468 U.S. 897, 906 (1984). In *Weeks* v. *United States*, 232 U.S. 383 (1914), however, this Court held that evidence seized in violation of the Fourth Amendment is generally inadmissible at a federal criminal trial, and in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the Court applied the exclusionary rule to the States. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim," but "to deter future unlawful police conduct." *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). Accord, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule * * * is the deterrence of police conduct that violates Fourth Amendment rights."); *Linkletter* v. *Walker*, 381 U.S. 618, 636-637 (1965). "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Calandra*, 414 U.S. at 348; see *Leon*, 468 U.S. at 906.

This Court has consistently recognized the "substantial social costs exacted by the exclusionary rule." *Leon*, 468 U.S. at 907. The fact that physical evidence has been obtained in violation of the Fourth Amendment generally has no bearing on the probative value of the evidence seized. To the contrary, "the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Stone*, 428 U.S. at 490; accord, *e.g.*, *United States* v. *Janis*, 428 U.S. 433, 447 (1976) (observing that application of the exclusionary rule will "nearly always" cause "concededly relevant and reliable evidence [to] be rendered unavailable"). "An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." *Leon*, 468 U.S. at 907; accord, *e.g.*, *Stone*, 428 U.S. at 490 ("Application of the rule thus deflects the truthfinding process and often frees the guilty."). That, in turn, may diminish public confidence in the integrity of the criminal justice system. See *id.* at 491 (observing that, "although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice").

Recognizing the potential deleterious effects of the exclusionary rule, this Court has restricted its application to "those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348; accord, *e.g.*, *Arizona* v. *Evans*, 514 U.S. 1, 13-14 (1995); *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987); *Leon*, 468 U.S. at 908; *Janis*, 428 U.S. at 447. The Court has consistently rejected "[p]roposed extensions of the exclusionary rule to

proceedings other than the criminal trial itself." *Leon*, 468 U.S. at 909. The Court has determined, for example, that the rule should not apply on federal habeas corpus, where a state prisoner has already been afforded a full and fair opportunity in the state system to litigate his Fourth Amendment claim, see *Stone*, 428 U.S. at 494; in grand jury proceedings, see *Calandra*, 414 U.S. at 347-352; in civil deportation proceedings, see *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); or in federal civil tax proceedings where evidence was illegally seized by state officials, see *Janis*, 428 U.S. at 459-460.

Even in criminal prosecutions, the Court has rejected an absolute rule that evidence obtained in violation of the Fourth Amendment may never be introduced at trial. Thus, the Court has held the exclusionary rule to be inapplicable where police officers have acted in objectively reasonable reliance on a search warrant ultimately found to be invalid, see *Leon*, 468 U.S. at 920-922, or on the constitutionality of a statute later declared unconstitutional, see *Krull*, 480 U.S. at 349-350. A criminal defendant who was not himself the victim of an unlawful search may not use the exclusionary rule to obtain suppression of evidence seized in violation of another person's Fourth Amendment rights. See *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969). And even where illegally seized evidence is excluded from the government's case in chief, the evidence may still be used to impeach a defendant's direct testimony, see *Walder* v. *United States*, 347 U.S. 62, 65 (1954); cf. *Oregon* v. *Hass*, 420 U.S. 714, 721-723 (1975) (statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), may be introduced to impeach defendant's testimony); *Harris* v. *New York*, 401 U.S. 222, 224-225 (1971) (same), or to impeach his statements in response to proper cross-examination reasonably suggested by his

direct examination, see *United States* v. *Havens*, 446 U.S. 620, 627-628 (1980).

In limiting the scope of the exclusionary rule, the Court has repeatedly expressed skepticism that extending it beyond the context of a criminal trial will contribute significantly to the rule's deterrent effect. See, *e.g.*, *Calandra*, 414 U.S. at 351 ("Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal."); *Janis*, 428 U.S. at 453-454 (if application of the exclusionary rule to state criminal prosecutions significantly deters misconduct by state officers, "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a different proceeding surely does not outweigh the cost to society of extending the rule to that situation"); *Stone*, 428 U.S. at 493 (while the exclusionary rule's deterrent value justifies its application at trial, "the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs").

The Court has indicated, in particular, that the need for deterrence is likely to be substantial only where the officials to be deterred are law enforcement personnel "engaged in the often competitive enterprise of ferreting out crime." *Leon*, 468 U.S. at 914. Thus, the Court has observed that "[j]udges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them." *Id.* at 917. The Court reached a similar conclusion in holding that the exclusionary rule should not apply to evidence seized in reasonable reliance on a state statute because exclusion of

such evidence is unlikely to have a significant deterrent effect on state legislators' enactment of unconstitutional legislation. *Krull*, 480 U.S. at 350-352.

The Court has also been unwilling to extend the exclusionary rule to contexts in which its application would have deleterious consequences over and above the impairment of the truth-finding function that is always inherent in the exclusion of probative evidence. The Court has declined, for example, to apply the rule to procedural settings that cannot readily accommodate suppression hearings. See *Calandra*, 414 U.S. at 349 (application of exclusionary rule "would delay and disrupt grand jury proceedings" because "[s]uppression hearings would halt the orderly process of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective"); *Lopez-Mendoza*, 468 U.S. at 1048 (noting that "[t]he [Immigration and Naturalization Service] currently operates a deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions," and that "[t]he prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of these proceedings"). The Court has expressed particular reluctance to apply the exclusionary rule to "proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal." *Id.* at 1046; see *id.* at 1046-1047.

B. The Exclusionary Rule Should Not Be Extended To Parole Revocation Proceedings

1. *The incremental deterrence of Fourth Amendment violations is limited*

The Supreme Court of Pennsylvania recognized that application of the exclusionary rule to parole revocation

proceedings would be unlikely to affect the conduct of officers who are unaware of a parolee's status. See Pet. App. 15a. That holding is clearly correct. In that situation, the remote possibility that the object of a search is in fact a parolee, and that any evidence seized in violation of the Fourth Amendment will be excluded from a parole revocation proceeding as well as from a criminal trial, "is unlikely to act as an additional deterrent to illegal police behavior." *Ibid.*

The court asserted, however, that "[a] different balance exists * * * when the officer knows or has reason to know that the suspect is a parolee or probationer." Pet. App. 15a. Under those circumstances, the court concluded, "there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." *Ibid.* That reasoning is unsound. Even where the official conducting the search is aware of the parolee's status, application of the exclusionary rule to parole revocation proceedings is unlikely to provide much incremental deterrence of Fourth Amendment violations.

a. Where the search is conducted by police officers whose primary responsibility is the investigation of crimes and the apprehension of criminals, the underlying premise of the exclusionary rule is that the prospect of suppression at the criminal trial itself will provide a substantial disincentive to unlawful searches and seizures. If that premise is accurate, the possibility that the same evidence might be introduced at a parole revocation hearing—a prospect far removed from the principal focus of a police officer's day-to-day activities—is unlikely to alter the rule's deterrent effect in any substantial way. Cf. *Stone*, 428 U.S. at 493; *Janis*, 428 U.S. at 453-454. Thus, even if the police officer is aware that the object of

his search is a parolee, his behavior is unlikely to be affected by the potential admissibility of seized evidence at a parole revocation hearing.

b. Where (as in the instant case) the search is conducted by a parole officer, somewhat different considerations obtain. The parole officer's responsibility is not to enforce the criminal law as against the public generally; it is "to assist parolees and to offer them guidance," *Morrissey* v. *Brewer*, 408 U.S. 471, 478 (1972), as well to monitor their compliance with the conditions of release. When a parole officer investigates a supervisee's possible misconduct, he is therefore likely to be principally concerned with the impact (if any) of that misconduct on the individual's suitability for continued release on parole, rather than with the possibility of a new criminal prosecution.

Nevertheless, parole officers are unlikely (at least as a general matter) to be subject to the institutional pressures that have been invoked in support of the exclusionary rule. While parole officers are not "judicial officers," neither are they "adjuncts to the law enforcement team." *Leon*, 468 U.S. at 917; cf. *Griffin* v. *Wisconsin*, 483 U.S. 868, 876 (1987) ("Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen."). As this Court has observed, it would "be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer." *Morrissey*, 408 U.S. at 485-486. See also *Gagnon* v. *Scarpelli*, 411 U.S. 778, 783-784 (1973); *id.* at 784 ("the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation").

Individual parole officers (like judges or legislators) will occasionally reach erroneous judgments as to the precise contours of applicable Fourth Amendment requirements. Unlike "a law enforcement officer engaged in the often competitive enterprise of ferreting out crime," *Leon*, 468 U.S. at 914 (internal quotation marks omitted), however, parole officers as a class should be largely free from the institutional pressures that are thought to require an extraordinary deterrent to unconstitutional behavior. As with magistrates, see *Leon*, *supra*, and state legislators, see *Krull*, *supra*, application of the exclusionary rule to such officials can therefore be expected to have an insubstantial effect on the incidence of Fourth Amendment violations.

2. *The costs of extending the exclusionary rule to parole revocation proceedings are high*

Against whatever modest incremental deterrence might flow from extension of the exclusionary rule to parole revocation proceedings must be weighed the costs of such a regime. Application of the exclusionary rule in the parole revocation context would have substantial costs, over and above the impairment of the truth-finding function that is an inherent consequence of the suppression of probative evidence.

a. Application of the exclusionary rule to parole revocation proceedings would significantly disrupt the conduct of the hearings themselves. This Court in *Morrissey*, while establishing minimum procedural requirements for the conduct of parole revocation hearings, "emphasize[d] [that] there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense." 408 U.S. at 489.[5] The Court stated in particular that the

[5] See also *Morrissey*, 408 U.S. at 480 ("[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights

proceeding should be held before "a 'neutral and detached' hearing body such as a traditional parole board, *members of which need not be judicial officers or lawyers.*" *Ibid.* (emphasis added).

In *Gagnon*, the Court observed that "[t]he introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding," 411 U.S. at 787; see also *id.* at 787-788, and concluded that "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings," *id.* at 790. The Court warned in particular that "[t]he role of the hearing body itself, aptly described in *Morrissey* as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial" in cases where attorneys are utilized. *Id.* at 787. The Court stated that appointment of counsel will generally be appropriate only where the parolee presents (*id.* at 790)

> a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

---

due a defendant in such a proceeding does not apply to parole revocations."); *id.* at 483 ("Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole."); *id.* at 484 ("What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.").

Thus, the thrust of the *Gagnon* Court's analysis is that the participation of counsel—and the consequent formalization of the hearing process—would be desirable only in those comparatively rare cases where parole authorities would otherwise be unable to reach an informed conclusion on the existence of a parole violation or the appropriateness of revocation. Application of the exclusionary rule to revocation hearings, however, would require parole authorities to master a complex body of constitutional law essentially unrelated either to the authorities' natural sphere of expertise or to the parolee's suitability for continued release. The government's substantial interest in preserving the expedition and relative informality of the parole revocation process would thus be undermined if parole authorities were required to entertain suppression motions based on alleged Fourth Amendment violations. Compare *Calandra*, 414 U.S. at 349-350; *Lopez-Mendoza*, 468 U.S. at 1048.[6]

b. The State's administration of its parole system involves "special needs, beyond the normal need for law enforcement." *Griffin*, 483 U.S. at 873. The underlying premise of maintaining close supervision of persons on parole is that persons released from prison are more likely to

---

[6] Those burdens would not be significantly reduced by limiting the exclusionary rule to those situations in which the officer conducting the search "knows or has reason to know that the suspect is a parolee or probationer." Pet. App. 15a; see *id.* at 14a-15a (Pennsylvania Supreme Court acknowledges that "the harm to the parole revocation proceeding from application of the exclusionary rule remains the same whether or not the officer is aware of the parolee's status"). To the contrary, that limitation might actually make the suppression hearing more complicated and protracted by requiring the hearing board to determine not only the legality of the search, but the extent of the searching officer's (actual or constructive) knowledge of parolee status as well.

violate applicable restrictions than persons who have never been convicted of a crime. See *Morrissey*, 408 U.S. at 483 ("Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts."); *Griffin*, 483 U.S. at 880 ("it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law"). Protection of the public against criminal acts by parolees can be accomplished only if parole can be revoked should the parolee violate the conditions of parole. There is consequently a particularly strong public interest in ensuring that the officials who oversee the system are apprised of complete and accurate information bearing on the parolee's continued suitability for release.[7]

"Revocation [of parole] deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on ob-

[7] The courts of appeals have consistently held that the exclusionary rule does not apply to federal sentencing proceedings. See, *e.g.*, *United States* v. *Kim*, 25 F.3d 1426, 1436 (9th Cir.), cert. denied, 513 U.S. 1030 (1994); *United States* v. *Montoya-Ortiz*, 7 F.3d 1171, 1181 (5th Cir. 1993); *United States* v. *Jenkins*, 4 F.3d 1338, 1344 (6th Cir. 1993), cert. denied, 511 U.S. 1034 (1994); *United States* v. *Tejada*, 956 F.2d 1256, 1260-1264 (2d Cir.), cert. denied, 506 U.S. 841, 920 (1992); *United States* v. *Lynch*, 934 F.2d 1226, 1234-1237 (11th Cir. 1991), cert. denied, 502 U.S. 1037 (1992); *United States* v. *McCrory*, 930 F.2d 63, 67-69 (D.C. Cir. 1991), cert. denied, 502 U.S. 1037 (1992); *United States* v. *Torres*, 926 F.2d 321, 322-325 (3d Cir. 1991). But see *United States* v. *Jewel*, 947 F.2d 224, 238-240 (7th Cir. 1991) (Easterbrook, J., concurring). If the exclusionary rule does not apply to the proceeding at which the length of a defendant's sentence is established, it would make little sense to apply the rule to a subsequent proceeding used to determine where a portion of that sentence will be served.

servance of special parole restrictions." *Morrissey*, 408 U.S. at 480. Respondent's release from prison was made contingent on his agreement to abide by several conditions, including a categorical prohibition on the ownership or possession of weapons. See *Commonwealth* v. *Williams*, 692 A.2d 1031, 1037 (Pa. 1997) (noting that, under Pennsylvania law, the "parolee acknowledges that he ha[s] read parole agreement, that he fully understands conditions of his parole and he agrees to follow such conditions"). Revocation of parole is properly regarded, not simply as a punishment of the parolee for the violation of its conditions, but as a means of protecting the community. Respondent should not be permitted to retain the benefits of parolee status, based on the asserted illegality of the search at issue here, when his failure to comply with the conditions of release indicates that he may pose a threat to the public welfare. Cf. *Lopez-Mendoza*, 468 U.S. at 1046 (noting that the Court "has never before accepted" the application of the exclusionary rule to "proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal").

II. WHERE A PAROLEE HAS CONSENTED TO SEARCHES AS A CONDITION OF PAROLE, THE FOURTH AMENDMENT DOES NOT REQUIRE INDIVIDUALIZED SUSPICION OF WRONGDOING TO JUSTIFY A SEARCH OF HIS RESIDENCE

In *Griffin* v. *Wisconsin*; 483 U.S. 868, 875-876 (1987), this Court upheld a warrantless search of a probationer's house based on a state regulation that permitted such searches where "reasonable grounds" existed to believe that contraband would be found. The Court did not adopt a "reasonable grounds" (or other individualized suspicion) requirement as a constitutional floor, and it did not con-

sider whether a person released on probation or parole could validly consent to searches without individualized suspicion as a condition of release. Under settled principles, however, such consent may justify searches of a parolee's residence, regardless of what the Fourth Amendment might otherwise require.

A. Constitutional Protections May Generally Be Waived In Exchange For Favorable Treatment From The Government

It is clear as a general matter that "a search conducted pursuant to a valid consent is constitutionally permissible," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973), and that the validity of the search does not turn on the officers' possession of either individualized suspicion or a warrant. Accord, *e.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990); *Zap* v. *United States*, 328 U.S. 624, 628 (1946). More generally, "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995); *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver.").

This Court has recognized, in particular, that an individual may, within broad limits, enter into arrangements with the government under which the individual relinquishes constitutional rights in return for a promise of favorable treatment. See, *e.g.*, *Zap*, 328 U.S. at 628 ("[W]hen petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts."). So long as the individual is accurately apprised of the options available to him, such agreements are generally enforce-

able even when the individual is forced to choose between unattractive alternatives. That principle is demonstrated most vividly by this Court's repeated recognition that the government may attempt through negotiation to persuade a defendant to plead guilty to a criminal charge. See, *e.g.*, *Mezzanatto*, 513 U.S. at 209-210 ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea.") (internal quotation marks omitted); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process"; defendant's plea held to be voluntary even though it "may have been induced * * * by fear of the possibility of a greater penalty upon conviction after a trial"); *Brady* v. *United States*, 397 U.S. 742, 755 (1970) ("[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.").

Much the same analysis applies to a consent to search entered into as a condition of release on parole. In *Griffin* v. *Wisconsin*, *supra*, this Court observed that "[p]robation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." 483 U.S. at 874. Nothing in the Constitution would prevent a criminal defendant from entering into a plea agreement that established not only the length of imprisonment to be served, but the nature of the facility in which that confinement would occur. If respondent could have entered into a plea agreement providing for confinement in a particular penal

institution, we see no reason that he could not also bargain for a less onerous punishment—*i.e.*, release into the community, subject to the condition that he could be searched at any time. Compare *People* v. *Bravo*, 43 Cal.3d 600, 609 (1987) ("A probationer's waiver of his Fourth Amendment rights [as a condition of release on probation] is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain."), cert. denied, 485 U.S. 904 (1988).

Relying on its decision in *Williams*, *supra*, the Supreme Court of Pennsylvania held that respondent's prior consent did not validate a search conducted without reasonable suspicion that respondent had committed a parole violation. Pet. App. 9a-10a.[8] The court in *Williams* as-

[8] The basis for the state court's holding is not altogether clear. The court's opinion might be read to hold simply that the parole conditions form signed by respondent, properly construed, furnished consent only to searches based upon reasonable suspicion. See Pet. App. 9a-10a (quoting *Williams*, 692 A.2d at 1036). We believe, however, that the court's resolution of the issue is more plausibly understood as resting on federal constitutional grounds. In *Williams*, the state court framed the question as "whether a parolee's Fourth Amendment rights have been violated by a warrantless search by his parole officer where the parolee has signed a consent form upon release." 692 A.2d at 1036. The court considered at length the pertinent decisions of other state courts, see *id.* at 1036-1037—decisions that would seem to have little relevance to the proper construction of the Pennsylvania form. The court concluded that a "middle ground" approach, under which warrantless searches would be permitted only if based on reasonable suspicion of parole violations, "comports with the Fourth Amendment protection afforded to parolees by the United States Supreme Court in *Griffin* * * * and in our sister states." *Id.* at 1037. Those passages suggest that, in the state court's view, even an unqualified consent to search executed as a condition of parole can justify a search, consistent with the Fourth Amendment, only where reasonable suspicion is present.

The court in *Williams* concluded that the search at issue had been based on reasonable suspicion of parole violations and was therefore

serted that such a limitation "protects the parolee by providing a check against state encroachment upon the parolee's limited Fourth Amendment right to be free from unreasonable searches." 692 A.2d at 1037. It is far from clear, however, that the long-term interests of potential parolees will actually be advanced by the limitation announced by the state court.

At least in a borderline case, conditions that enhance the State's ability to monitor its parolees may increase a parole board's willingness to release a prisoner into the community. Compare *Bravo*, 43 Cal.3d at 609 ("Were we to conclude that a probationer's waiver of Fourth Amendment rights were either impermissible or limited to

lawful. 692 A.2d at 1037-1038. The court then addressed the question whether Article I, Section 8 of the Pennsylvania Constitution required suppression of the evidence obtained during the search. See *id.* at 1038-1039. While recognizing that "Article I, Section 8 often provides greater protection" than the Fourth Amendment, *id.* at 1038, the court concluded that in the context of parolee searches no different standard was warranted, explaining that "[t]he policy concerns expressed above in the analysis of the legality of the search at issue under the Fourth Amendment also apply equally to consideration of the legality of the search under Article I, Section 8 of the Pennsylvania Constitution," *id.* at 1039.

Absent "a 'plain statement' that a decision rests upon adequate and independent state grounds," this Court has jurisdiction to review the issues of federal law presented by a case that originated in state court. *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983). Even where a state court's decision rests on both state and federal grounds, the Court has jurisdiction if it appears that the state court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Id.* at 1043 n.8 (quoting *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)). The Pennsylvania Supreme Court's opinions in the instant case and in *Williams* do not contain a plain statement that the court's resolution of the consent issue was based on state law grounds independent of Fourth Amendment concerns.

searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose."). As this Court observed in *Mezzanatto*, "[a] sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips. * * * A defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying." 513 U.S. at 208. Of course, the interests of a particular parolee, such as respondent, may be advanced if he is permitted to retain the benefit of his bargain (release on parole) while escaping its less attractive consequences (consent to searches). It does not follow, however, that limitations on the State's ability to insist on a more expansive consent to search can be expected to serve the interests of potential parolees as a class.

B. A Consent-To-Search Condition Enhances The State's Ability To Monitor Its Parolees' Compliance With The Terms Of Their Release, And Is Therefore Reasonably Related To The Benefit Provided To The Parolee

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose waiver is at issue. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). This Court's unconstitutional conditions jurisprudence suggests that a State may not

condition an individual's release on parole upon his agreement to forgo the exercise of a constitutional right —*e.g.*, the First Amendment right to engage in religious observance, or to make public statements critical of the government—that is wholly unrelated to his status as a parolee.

A requirement that parolees consent to search, by contrast, directly furthers the State's interest in the effective administration of its parole system, even where the State cannot demonstrate a particularized basis for suspecting an individual parolee of violating the conditions of his release. Parolees present a heightened risk of committing further criminal or other antisocial acts justifying close monitoring and supervision. See pages 19-20, *supra*. The purpose of conditional release is to assist in the prisoner's reintegration into the community, while minimizing the threat to the public safety and welfare that release may entail. The ability to conduct a search to assess the parolee's compliance with the conditions of his release is therefore reasonably related to the benefit offered by the government as a quid pro quo, even where state officials have no individualized basis for believing that a violation has occurred.

C. The Fact That A Potential Parolee Is Forced To Choose Between Unattractive Alternatives Does Not Render His Consent To Search Involuntary

A parolee's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is continued incarceration. It has been suggested that a potential parolee has no choice but to accept the consent-to-search provision.[9] That suggestion

---

[9] See, *e.g.*, 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b) at 135 (2d ed. 1987) ("to speak of consent in this context is to resort to a manifest fiction, for the

appears to rest on one of two propositions. First is the notion that an individual would not, under any circumstances, make a voluntary decision to accept a lengthy prison term. That proposition is false: criminal defendants can and often do enter into plea agreements that provide for substantial periods of incarceration, generally because they conclude that their alternatives are even more unattractive. This Court has repeatedly recognized that a plea of guilty is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. See page 23, *supra*.

The view that a parolee lacks any true choice in the matter may rest instead on the perception that no one would choose to spend time in prison *in preference to release on parole* because parole, even pursuant to a consent-to-search condition, is substantially less onerous than continued incarceration. That reasoning is also flawed. The government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more advantageous than the other. No one would suggest, for example, that a defendant's plea of guilty is involuntary if the government offers him a favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

---

probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse") (footnote and internal quotation marks omitted); *Commonwealth* v. *Walter*, 655 A.2d 554, 556 n.1 (Super. Ct.) ("Needless to say, there is no bargaining for terms of parole, nor is it likely that any prisoner is going to refuse parole simply because the terms are unfavorable."), appeal denied, 670 A.2d 141 (Pa. 1995).

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
VICKI MARANI
Attorney

JANUARY 1998